

THIS DISPOSITION IS
NOT CITABLE AS
PRECEDENT OF THE TTAB

Mailed:
September 21, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Desiccare, Inc.

Serial No. 76516062

Cleveland R. Williams, Esq. for Desiccare, Inc.

Barbara A. Gold, Trademark Examining Attorney, Law Office
106 (Mary I. Sparrow, Managing Attorney).

Before Seeherman, Quinn, and Drost, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On May 23, 2003, Desiccare, Inc. (applicant) applied to register the mark MOLD-AWAY (standard character form) on the Principal Register for goods ultimately identified as "moisture absorbing kits, comprising, chemical compositions and apparatus, namely, silica gel, zeolite molecular sieves, clay, lime, calcium chloride, desiccant bags, synthetic bags, and plastic trays, all sold as a unit" in Class 1. Serial No. 76516062. The application lists the

date of first use and date of first use in commerce as November 8, 2002.

The examining attorney refused to register the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). The examining attorney held that applicant's mark as used on its goods was likely to cause confusion, to cause mistake, or to deceive in view of the cited registration for the mark MOLD AWAY, in standard character form, for "mildew spot remover" in Class 3. The registration (No. 1,023,583) issued October 28, 1975 and it has been renewed.¹ The registration disclaims the term "Mold." The examining attorney points out that the only difference between the marks is the presence of a hyphen in applicant's mark. Regarding the goods, the examining attorney argues (brief at 6) that they are "directly related, complimentary [sic] products that are distributed in the same trade channels. Thus, it is foreseeable that the average purchaser will presume that registrant is using its expertise and research to target mold and mildew at various stages." Applicant, on the other hand, emphasizes the presence of the hyphen in its mark. Regarding the

¹ A second renewal of this registration must be filed within one year prior to October 28, 2005 or within a six-month grace period after that date. 15 U.S.C. § 1059

goods, applicant argues that the goods are in different international classes and applicant's "product is solid while Registrant's is liquid; applicant's product absorbs moisture from the air as compared to Registrant's product which is liquid and does not absorb moisture from the air." Brief at unnumbered p. 4.

After the examining attorney made the refusal final, this appeal followed.

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The first factor we address concerns the similarities and dissimilarities of applicant's and registrant's marks. When we consider the marks, we look to see whether they

are similar in sound, appearance, meaning, and commercial impression. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Applicant's mark is MOLD-AWAY and registrant's mark is MOLD AWAY. Obviously, both marks consist of the same words MOLD and AWAY in the same order. The only difference is that applicant uses a hyphen to separate the words while registrant uses a space. This is not a significant difference. Seaguard Corp. v. Seaward International, Inc., 223 USPQ 48, 51 (TTAB 1984) (SEA GUARD and SEAGUARD are "essentially identical"). Similarly, the presence of a hyphen does not significantly change the appearance of the marks. We add that a "[s]ide by side comparison is not the test." Grandpa Pigeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973). Furthermore, "Human memories ... are not infallible." In re Research and Trading Corp., 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), quoting, Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd., 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970). Many, if not most, prospective purchasers would not remember the hyphen. Even if they did, it is unlikely that they would rely on the hyphen to distinguish the marks. Their appearance is almost identical. Furthermore, the meanings and commercial impressions of the

marks would be essentially the same. When the marks are considered in their entirety, the marks' pronunciation would be identical. Therefore, we conclude that the marks MOLD-AWAY and MOLD AWAY are virtually identical.

The next factor we consider is whether the goods of applicant and registrant are related. Applicant points out that the goods of applicant and registrant are in different classes. However, the fact that goods are in different classes does not support applicant's argument that confusion is not likely. 15 U.S.C. § 1112 ("The Director may establish a classification of goods and services, for convenience of Patent and Trademark Office administration, but not to limit or extend the applicant's or registrant's rights").

Applicant also makes several points about the differences between applicant's and registrant's goods. However, to the extent that these differences are not reflected in the identification of goods, they do not show that confusion is unlikely. Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may

reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"). See also In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (punctuation in original), quoting, Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1816 (Fed. Cir. 1987) ("Likelihood of confusion must be determined based on an analysis of the mark applied to the ... [goods or] services recited in applicant's application vis-à-vis the ... [goods or] services recited in [a] ... registration, rather than what the evidence shows the ... [goods or] services to be"). Therefore, registrant's mildew spot remover must be deemed to include all types of mildew spot removers.²

Registrant's goods are mildew spot removers and applicant's goods are "moisture absorbing kits." Applicant's specimen makes it clear that its moisture absorbing kits inhibit "potentially dangerous mold." Applicant argues that its goods "inhibit the growth of fungal or mold spore growth by absorbing moisture from the air thus removing a very basic element, which it needs to

² We do not rely on any evidence that was submitted for the first time with applicant's appeal brief (37 CFR § 2.142(d)) although we add that it would not change the result in this case.

grow." Response dated April 30, 2004 at 3 (emphasis in original). We assume that the goods are not identical.

However, in "order to find that there is a likelihood of confusion, it is not necessary that the goods or services on or in connection with which the marks are used be identical or even competitive. It is enough if there is a relationship between them such that persons encountering them under their respective marks are likely to assume that they originate at the same source or that there is some association between their sources." McDonald's Corp. v. McKinley, 13 USPQ2d 1895, 1898 (TTAB 1989). Furthermore, when both parties are using virtually the identical designation, "the relationship between the goods on which the parties use their marks need not be as great or as close as in the situation where the marks are not identical or strikingly similar." Amcor, Inc. v. Amcor Industries, Inc., 210 USPQ 70, 78 (TTAB 1981). See also In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993) ("[E]ven when goods or services are not competitive or intrinsically related, the use of identical marks can lead to an assumption that there is a common source").

Mildew is defined as "a fungus that attacks some plants or appears on damp cloth, etc. as a white coating." Mold is defined as "a fungus producing a furry growth on

the surface of organic matter." *Webster's English Dictionary for Home, School or Office* (2003). We take judicial notice of these definitions. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Here, mildew spot removers and moisture absorbing kits used to inhibit mold are, at least, complementary products. Indeed, the evidence of record demonstrates that some products are used to combat the problems associated with both mold and mildew. See, e.g., DryWave (sic) 110v Air Dryer ("The Dry Wave Air Dryer gently warms and dries the air to prevent the formation of mold & mildew on wall surfaces"); Tile-Aid II ("Inhibits mildew and mold staining. Dissolves and removes calcium, lime, soap scum, body and tanning oils, mold and mildew stains, and cosmetics"); and Cavicide Disinfectants/Cleaners ("Cavicide combines both a disinfectant and cleaner for use on all non-porous surfaces, including plastics, stainless steel, glass, tile, Formica and more. Effective at removing mold and mildew").

Furthermore, professionals and individuals dealing with both problems are likely to be in the market for a product that absorbs moisture to prevent the development of

mold and mildew and one that treats mildew spots that may nonetheless appear. Therefore, we conclude that not only are the products related but that purchasers would overlap. Furthermore, the products would likely be sold in some of the same channels of trade.

When the marks MOLD-AWAY for moisture absorbers that inhibit mold growth and MOLD AWAY for mildew spot removers are used by different parties, we hold that confusion is likely. We have taken into consideration the fact that "mold away" is a suggestive term when applied to products that inhibit or remove mold. However, the other factors, including the virtual identity of the marks, the relatedness of the goods, and the fact that the purchasers and channels of trade for the goods are overlapping, are more significant. Under these circumstances, purchasers are likely to assume that there is some association between the sources of these products.

Our final point is that any doubts about whether there is a likelihood of confusion must be resolved in favor of the prior registrant and against the newcomer. In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729, 729-30 (CCPA 1973); In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d

Ser No. 76516062

1025, 1026 (Fed. Cir. 1988). To the extent we have such doubts, we resolve them in registrant's favor.

Decision: The refusal to register applicant's mark under Section 2(d) is affirmed.